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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-178780

August 8, 1973

Howard, Poe and Bastian
1701 Pennsylvania Avenue, NW.
Washington, D. C. 20006

Attention: James H. Bastian, Esquire

Gentlemen:

This is in reply to your letter of July 2, 1973, regarding the protests filed by Saturn Airways, Incorporated, and Overseas National Airways, Incorporated, against an award of a contract to Southern Air Transport, Incorporated, by the Military Airlift Command, Scott Air Force Base, Illinois.

We are enclosing a copy of our letter of today to counsel for Saturn concerning this matter.

Sincerely yours,

Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20543

D-178780

August 8, 1973

Wilner & Scheiner
2021 L Street, NW.
Washington, D. C. 20036

Attention: Paul Y. Saligson, Esquire

Gentlemen:

This is in reference to the May 31, 1973 telefax from Saturn Airways, Incorporated, and to your subsequent correspondence on its behalf, protesting against a proposed award of a contract to Southern Air Transport, Incorporated (SAT), by the United States Air Force under requests for proposals No. F11626-73-R-0018 and -0019, issued by the Military Airlift Command, Scott Air Force Base, Illinois.

The solicitations, for domestic cargo airlift, were issued pursuant to a Class Determinations and Findings signed by the Secretary of the Air Force, which authorized the negotiation of contracts under 10 U.S.C. 2304(a)(16) in support of the Department of Defense airlift mobilization base program. Proposals were received from Saturn, SAT, and Overseas National Airways, Incorporated (ONA). The Air Force has awarded contracts worth approximately \$18.2 million to Saturn and \$16.3 million to ONA, and proposes to award a contract to SAT for approximately \$3.8 million. The proposed contract would call for airlift services worth \$1.1 million through December 1973, and additional services worth \$2.7 million starting in January 1974.

You claim that any award to SAT would be improper because that company is owned and controlled by a Government agency and, therefore, is not a qualified offeror. You further claim that the situation is not changed because of the existence of an agreement to transfer ownership of SAT to a private individual, since the agreement provides that it will not take effect until it is approved by the Civil Aeronautics Board. In addition, you assert that the proposed transfer of ownership would not be in accordance with the laws and regulations dealing with disposal of Government property.

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The Air Force reports that, pending a CAB decision on the proposed transfer, SAT is being operated by the intended buyer (a private individual) for his own benefit, that no element of the Government is currently subsidizing or aiding the company, and that any profits or losses from the date of the agreement (February 1973), will accrue to the buyer if the CAB approves the transfer. It is further reported that should CAB not approve the transfer, SAT will be liquidated, and any DOD contracts with SAT will be terminated. In this connection, we are advised that the Air Force proposes to include in its contract with SAT a provision calling for contract termination, without cost, by unilateral action of the contracting officer in the event CAB approval is not obtained.

You state, however, that the Air Force is not correct in viewing SAT as an essentially independent operation, and assert that there is actually more Government control and subsidization involved in the current operation of SAT than admitted to by the Air Force. You contend that such an award would be improper because it would be contrary to Bureau of the Budget (now Office of Management and Budget /OMB/) Circular A-76 and to certain Defense Department directives, would involve the Government in a conflict of interest, and would result in unfair competition. In this respect, you state that it is "fundamentally unfair that a taxpaying privately-owned company should be compelled to bid against another firm * * * actually supported by public funds." You further point out that the existing CAB rate structure for the aircraft and routes involved is based on operating costs, and claim that an award to a Government-subsidized firm could result in a downward revision of the rates, which would be unfair to Saturn. You also assert that the private individual currently operating SAT pending CAB approval of his purchase of SAT's stock from the nominal stockholders (of which he is one) is actually a Government employee who would obviously personally benefit from the proposed award if the transfer of ownership is approved.

OMB Circular A-76, and the Defense Department's implementing directives (DOD Instruction 4100.33, Air Force Regulation 26-12), express a general policy preference for contracting with private, commercial enterprises as opposed to the Government's performing the required services "in house." However, the Circular specifically provides for the use of Government-furnished services when the "service is available from another Federal agency." Since it is not asserted that SAT is controlled by the Department of the Air Force, it appears that the Air Force would not be precluded by the provisions of the Circular from awarding a contract to SAT. In addition, the Circular also allows Government operation of a commercial activity "to maintain or strengthen mobilization readiness," and as noted above, these procurements are based on the negotiation

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authority of 10 U.S.C. 2304(a)(16) and ASPR 3.216, which deal with the maintenance of an industrial mobilization base. In any event, we have always regarded the provisions of Circular A-76 as matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision functions of the General Accounting Office. B-170079, September 15, 1970.

We do not agree with the contention that the awarding of a contract to SAT would involve the Government in a conflict of interest. The statutory provisions to which you make reference, 18 U.S.C. 205, 18 U.S.C. 207-208, prohibit an officer or employee of the United States, during the period of employment and for a one year period thereafter, from representing anyone other than the United States before a court or a Federal agency if the United States is a party to or has an interest in the matter. The record shows that SAT's intended buyer has been serving as the president, as well as a director and a nominal stockholder, of SAT during the period of reported Government control. However, we do not believe that this makes him an "officer or employee" of the United States within the meaning of the above provisions, nor do we see anything in the record which indicates that he is or would be involved in the type of conduct prohibited even if he were such an employee.

Similarly, we do not believe that ASPR 1.302-6, which states that contracts shall not be entered into between the Government and its employees or business organizations controlled by such employees, can preclude an award to SAT. As indicated, we do not view SAT's president as a Government employee. More significantly, the regulation prohibits awards to a corporation "controlled" by a Government employee, while, of course, you have contended that ultimate corporate control of SAT has been exercised by the Government and not by a Government employee.

For the above reasons, we cannot agree that any statutory or regulatory provision precludes the proposed contract award to SAT. Furthermore, we do not believe that this procurement involves any element of unfair competition, since the proposed award to SAT is based on evaluation of its airlift capability and not on its proposed price. While SAT may have received prior Government aid, we have stated, in another connection, that "while it is the policy of the United States Government to eliminate the competitive advantage that accrues to a prospective contractor from the use of United States Government-furnished property and facilities, it is obviously not possible to eliminate the advantage which might accrue to a given firm by virtue of other Federal, state or local programs.

* * * We know of no requirement for equalizing competition by taking into consideration these types of advantage * * *." B-175496,
November 10, 1972.

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Furthermore, we think it is clear that under 10 U.S.C. 2304(a) (15), ASFR 3-316, and a proper Determinations and Findings executed in accordance therewith, a procuring agency has broad discretionary authority to award contracts in the interest of the national defense. " * * * ASFR 3-216 * * * provides that the Secretary shall determine when it is in the interest of the national defense to negotiate a contract with a particular manufacturer in order to assure that property or services will be available to the Government during a national emergency." 49 Comp. Gen. 463, 471 (1970). (Underscoring supplied.)

We see no reason to object to the exercise of that authority. The record establishes that the Air Force has a legitimate basis for making an award to SAT. It is reported that the aircraft offered by SAT are desired for the Civil Reserve Air Fleet (CRAF) and, therefore, are essential to the airlift mobilization base program. It is further reported that these aircraft were in the mobilization base during the previous fiscal year and that SAT has participated in these mobilization base procurements each year since 1961. The Class Determinations and Findings signed by the Secretary of the Air Force states that "it is in the interest of national defense that contracts with CRAF air carriers * * * be consummated so as to assure availability to the DOD of a commercial airlift augmentation fleet best adapted to DOD needs in case of national emergency." Pursuant to that D & F, the Air Force has determined that DOD needs will best be served by an award to SAT. It has further determined that SAT is a CAB-certified air carrier and is qualified to perform the contract in accordance with the provisions of the solicitations, and is otherwise a qualified offeror.

Accordingly, since it appears that the proposed award to SAT would be in accordance with the Determinations and Findings and would not be contrary to any provision of law or of implementing directives, we are unable to interpose an objection to an award to SAT.

You also contend that the proposed sale of SAT would contravene the statutory provisions regarding disposal of Government property. The degree to which the Government possesses any legal or beneficial interest which may be disposed of by sale has not been established. In any event, such sale has apparently not yet taken place and we do not have sufficient information with respect to the procedure expected to be followed in connection with the proposed disposition to

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render any judgment as to its legality. We think it is appropriate to point out, however, that 40 U.S.C. 434(e)(3) provides for disposal by negotiation with such competition as is "feasible under the circumstances" in given situations, one of which is where the national security will thereby be promoted.

For the foregoing reasons, your protest is denied.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States